In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-42

MELVIN S. BORNSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-43

NATHAN GROSSGOLD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners Bornstein and Grossgold were each convicted of nine counts of mail fraud in a scheme to defraud certain insurance companies in violation of 18 U.S.C. 1341. Petitioner Grossgold was sentenced to pay a fine of $3,500 and petitioner Bornstein was sentenced

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to two years imprisonment. The court of appeals affirmed (Pet. App. 1a–8a).

The essential facts are set forth in the opinion of the court of appeals (Pet. App. 1a–8a). In brief, they show that petitioner Bornstein was the general manager of the Whitehall Mutual Fire and Marine Insurance Company and petitioner Grossgold, Bornstein's brother-in-law, was first the claims manager of Whitehall and later, as an independent attorney, handled Whitehall's subrogation claims (Tr. 76–77).[1] The general scheme, which occurred between the years 1961 and 1963, involved taking an insured's damaged automobile to Al Palumbo Auto Rebuilders, who would make up a high written estimate which the insured would submit to Bornstein or Grossgold. Then Palumbo, Bornstein, and Grossgold would come to an agreed price to repair the automobile, which was much less than the estimate (Tr. 379–389). The high estimate was then mailed to another insurance company, which insured Whitehall, and the low estimate was paid to Palumbo (Tr. 315–316; 363; 378–379; 387–389; 391–392; 402–406; 408; 412–413; 436–445; 452–454; 459; 631). Although Whitehall recovered more than the full amount of the repairs, it never refunded to its insured the excess or the $100 deductible it recovered from the other insurance companies (Tr. 260–261).

1. Both petitioners assert that the pre-indictment delay denied them their Sixth Amendment right to a speedy trial. As the court of appeals noted (Pet. App.

[1] "Tr. refers to the transcript in the court of appeals, on file with this Court.

4a–6a), the passage of time between the events on which the prosecution was based and the indictment did not hamper petitioners' defense and was justified in view of the need for extensive investigation of voluminous records. In 1964, the company voluntarily turned over its records to the Illinois Department of Insurance, which in the summer of 1966 notified the postal authorities of possible mail fraud violations. The following two years were spent in a meticulous investigation involving 140 files of Whitehall Mutual Fire and Marine Insurance Company. In fact, as the record shows, some of the records in the case did not come into the possession of the government until 1968, just prior to the indictment of petitioners (Tr. 149–150). Two months after the culmination of this investigation the indictment was returned.

The delay did not preclude the presentation of an effective defense. Although petitioners claim that the deaths of three possible witnesses prejudiced them, the affidavit of Postal Inspector Potter (Tr. 91) reveals that when interviewed both Mr. Katz and Mr. Zizzo gave information adverse to the petitioners. Moreover, Mr. Hoffman's testimony would have been of little value to the defense since he died in January, 1963, a time prior to most of the activities alleged in the indictment.

The question whether an indictment may be dismissed because of pre-indictment delay is before this Court in *United States* v. *Marion and Cratch,* No. 70–19, jurisdiction postponed to hearing on the merits, March 1, 1971. However, there is no need to delay action on this petition pending action in that case; it

is clear that there was no purposeful delay here and the claim of prejudice was considered and rejected by the courts below.

2. Both petitioners argue that the trial court erred in denying each petitioner's motion for a separate trial and for separate counsel. As the court of appeals opinion pointed out (Pet. App. 6a–8a), severance of defendants is discretionary with the trial court and will not be overturned except where strong prejudice is shown. An examination of the transcripts in this case reflects that there was no such antagonism in their positions to require a separate trial. Both petitioners denied any knowledge of the frauds involved in this case. Both claimed that they were not aware of any irregularities in the procedures of the company, but depended on their employees to review the company records. Grossgold also claimed that, when he was Whitehall's attorney, his wife (Bornstein's sister) had handled the preliminary subrogation work and that as she became more experienced she took on most of the responsibility (Tr. 662–664, 668). Bornstein corroborated the fact that his sister, Grossgold's wife, had helped Grossgold with the subrogation claims (Tr. 593, 615). According to Grossgold and his wife neither was cognizant of any frauds involved in their work (Tr. 672–673, 675, 686, 694, 714–717). When they testified, neither Bornstein nor Grossgold placed any blame on the other or imputed knowledge of the frauds to the other (Tr. 663–664).

Petitioners were not denied the opportunity to seek separate counsel. They were indicted on June 13,

1968 and retained joint counsel on July 8, 1968. On August 7, 1968, Grossgold filed a motion for severance, based solely on his claim that his attorney-client relationship with Whitehall would hamper his defense. This was denied on November 20, 1968. On November 25, 1968, petitioners renewed their claim for severance and for the first time expressed a need for separate counsel. Although their motion was denied on February 10, 1969, they were not tried until March 3, 1969, which allowed them more than sufficient time to engage separate counsel. Grossgold, an attorney himself, obviously concluded that joint representation was not prejudical. Common representation is not *per se* error; it must be shown that it resulted in prejudice or conflict of interest. Petitioners have failed to make such a showing in this case. See e.g., *Glasser* v. *United States,* 315 U.S. 60; *Rubin* v. *United States,* 433 F. 2d 442 (C.A. 5), certiorari denied, 401 U.S. 945; *Fryar v. United States,* 404 F. 2d 1071 (C.A. 10), certiorari denied, 395 U.S. 964.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN. N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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